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In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 152

NEWTON W. LUMBRA, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The District Court rendered no opinion. The opinion of the Circuit Court of Appeals (R. 332–335) is reported in 63 F. (2d) 796.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 14, 1933 (R. 335–336). The petition for a writ of certiorari was filed June 9, 1933, and was granted October 9, 1933. The jurisdiction of this Court is invoked under Section 240

(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the Circuit Court of Appeals erred in reversing the judgment of the District Court on the ground that there was no substantial evidence of total permanent disability of petitioner on May 31, 1919, and as incidental thereto, whether expert medical evidence is necessary to establish total permanent disability arising from an obscure or subjective condition.

STATUTES AND REGULATIONS INVOLVED

Section 400 of the Act of October 6, 1917, c. 105, 40 Stat. 398, 409, provides as follows:

> That in order to give to every commissioned officer and enlisted man and to every member of the Army Nurse Corps (female) and of the Navy Nurse Corps (female) when employed in active service under the War Department or Navy Department greater protection for themselves and their dependents than is provided in Article III, the United States, upon application to the Bureau and without medical examination, shall grant insurance against the death or total permanent disability of any such person in any multiple of $500, and not less than $1,000 or more than $10,000, upon the payment of the premiums as hereinafter provided.

This section was restated in substance in Section 300 of the Act of June 7, 1924, c. 320, 43 Stat. 624,

as amended by Section 12 of the Act of March 4, 1925, c. 553, 43 Stat. 1308 (U.S.C., Title 38, Sec. 511).

Treasury Decision 20, Bureau of War Risk Insurance, of March 9, 1918, defined total permanent disability as follows:

> Any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation shall be deemd * * * to be total disability.
>
> "Total disability" shall be deemed to be "permanent" whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it.

STATEMENT

The petition in the District Court, dated November 30, 1931, alleged maturity of a contract of war risk term insurance by total permanent disability on April 29, 1919 (R. 2–5). The case was tried before a jury (R. 15). At the close of all the evidence the United States moved for a directed verdict and to the denial thereof noted an exception (R. 247–248). The jury returned a verdict for the petitioner, upon which judgment was entered awarding payments of $57.50 a month from May 31, 1919 (R. 11–12).

The United States appealed to the Circuit Court of Appeals for the Second Circuit, urging as error, among other things, the denial of its motion for a directed verdict (R. 303–305). The Circuit Court

of Appeals reversed the judgment "because there was no evidence that on May 1, 1919, when the policy lapsed for nonpayment of premiums, it was reasonably certain that the disability of the insured would continue throughout his life" (R. 332).

The petitioner testified that he sustained an injury to his ankle and was rendered unconscious by concussion from a shell explosion while in service in France on June 17, 1918 (R. 20); that he remained in the hospital until late July or August 1918 (R. 84); that during his hospitalization he suffered frequently from "faint, weak spells, dizzy spells—everything go black, and the sweat stand out on me and I would have to sit down" (R. 21) but did not bring this condition to the doctors' attention as he wanted to rejoin his company (R. 22). Returned to duty, he testified that he was assigned to light kitchen work and so remained until he was discharged, April 29, 1919 (R. 23); that he did not seek or receive medical treatment in service after August 1918, but the "spells" of weakness and dizziness recurred and got gradually worse (R. 23).

For three or four months after discharge petitioner "stayed to home and rested" (R. 25). He then worked at a mill in 1919, 1920, and a portion of 1921, first at his pre-war duties rolling heavy logs into a vat nine or ten hours daily, and then at lighter inside work (R. 26), for wages of "around three dollars a day" (R. 93). He did not work "half of the time" and estimated his earnings at $10.00 or $11.00 weekly (R. 27).

Thereafter, he helped on his sister's farm for a few months, and then obtained employment with the Central Vermont Railroad Company in July 1922 (R. 29-30). He worked as a machinist's helper for "not quite a year" and then as a laborer in the car department. He testified to having lost considerable time (R. 30).

Following employment by the Boston and Maine Railroad, during which period he testified he lost considerable time and was discharged therefor (R. 30-31), the petitioner was again employed by the Central Vermont Railroad Company as a laborer or helper during the years 1924 to 1926 (R. 31). In 1926 he was assigned by the same company to lighter work as a janitor (R. 31) and was so employed until 1929 (R. 33), except for a brief period as night watchman (R. 32). On each of these assignments he testified that he lost considerable time from work (R. 31-32). Several witnesses testified that because the petitioner was a veteran he had been accorded favored treatment with respect to the deficiencies of his work (R. 122, 128–129, 139).

In February 1929, according to his testimony, petitioner had an attack or "spell" of unconsciousness while at work and was dismissed from employment (R. 33, 38). Subsequently he failed to secure employment and has done no work since (R. 38). While petitioner testified that his first seizure at work occurred in February 1929, he

stated that attacks of unconsciousness began in late 1922, or early 1923 (R. 33, 93), and that preceding such attacks he frequently would experience the same symptoms of nervousness which he testified manifested themselves while he was in the hospital in France (R. 39).

In 1919 and 1920 petitioner was treated by Dr. Frank B. Hunt for "nervous trouble; bronchitis" (R. 28). Dr. Hunt fixed the beginning date of his treatments as June 1920, at which time he found "rheumatism, chronic bronchitis and nervousness", considered by him in December 1920, to have "incapacitated Mr. Lambra to a certain extent from doing his daily tasks." The physician ascribed the foregoing disabilities to "shell shock, poison gas, and inclement weather during his war service" (R. 124) but did not consider his disability as totally incapacitating (R. 126). Petitioner did not complain to him of having epileptic seizures of any kind (R. 125).

Petitioner's first medical attention for the attacks to which he testified he had been subject to in a gradually increasing degree since June 1918, was in 1926 (R. 36). In 1926 or 1927, Dr. Byron Herman treated him for epileptiform seizures (R. 168), considered by the doctor as a possible result of concussion (R. 169.) This witness testified that one thus afflicted could work without danger at any ordinary labor not in close contact with machinery (R. 170). In 1920, upon his examination, on be-

half of the Veterans' Bureau, of the petitioner in connection with a claim for compensation, he had found a "negligible" vocational handicap, and in his report, under the heading "Brief military history of claimant's disability" made the record "never sick in army; Hospital once for sprained ankle in France" (R. 172).

Dr. Alan Davidson attended petitioner after the attack at work in 1929 (R. 158), and made a diagnosis of epilepsy, for which he knew no cure (R. 159). He recommended petitioner's dismissal from employment (R. 160). He expressed the opinion that an epileptic seizure would be a possible cause of injury by falling (R. 165) although between seizures one so afflicted "is perfectly capable" (R. 166).

Dr. Albee A. Skeels, who became acquainted with petitioner but a few months before the trial (R. 174), testified that traumatic epilepsy might develop five years after the initial injury (R. 182) and from the history considered petitioner to have grand mal epilepsy caused by head injury (R. 184). He did not know what petitioner's condition had been before his first seizure in 1923 but testified that he had "some nervous seizure" (R. 186).

Medical testimony for the United States showed petitioner to have a mild neurasthenia on examinations in 1924 (R. 203), later diagnosed as "severe neurasthenia and severe hysteria" in 1928, with a history of attacks of unconsciousness developing between 1926 and 1927 (R. 204, 211).

Government records introduced by the United States established that the Army medical history of the petitioner showed only hospital treatment for a sprained ankle sustained as a result of slipping while entering a dugout after a bombardment (R. 278, 274–280); a finding of no disability by an examining surgeon at discharge (R. 273), concurred in by the petitioner's company commander (R. 272), and a declaration at that time by the petitioner that he was not disabled in any way (R. 270–271). Other records relating to claims filed with the Veterans Bureau by the petitioner showed that in January 1927 he claimed compensation for "bronchial troubles, rheumatism, nervousness" resulting from "foreign service, gas and exposure" stated to have been first manifested "about one year ago" (R. 292). A similar claim, executed March 21, 1922, records "partial" disability of "lungs and throat" resulting from "gas" (R. 296).

The United States also introduced various applications by the petitioner for employment with the Central Vermont Railroad in which he stated that he had no physical defect which would render him unfit for service on the railroad (R. 282–290).

ARGUMENT

It is well established that recovery of disability benefits in a suit on a contract of war-risk insurance necessitates a submission of substantial evidence of total disability during the life of the insurance contract (*White* v. *United States*, 53 F. (2d) 565 (C.C.A. 5th); *United States* v. *Cole*, 45 F.

(2d) 339 (C.C.A. 6th); *United States* v. *McLaughlin*, 53 F. (2d) 450 (C.C.A. 8th)) then reasonably certain to continue totally disabling for life (*Eggen* v. *United States*, 58 F. (2d) 616 (C.C.A. 8th); *United States* v. *Diehl*, 62 F. (2d) 343 (C.C.A. 4th)).

In reversing the judgment for the petitioner (R. 335) the Circuit Court of Appeals for the Second Circuit held that the evidence submitted in the trial court was insufficient to establish the requisite condition of the disability alleged and therefore did not support the asserted claim to disability benefits as a result of claimed total and permanent disability. In the course of its opinion the court below said concerning the petitioner's contention that his contract of war-risk insurance had matured before lapse (R. 333–334):

> there was no testimony that when he allowed his policy to lapse his condition was such that it could be said with reasonable certainty that he then had epilepsy or that epilepsy would ensue or that for any reason he was then permanently disabled. There was evidence from which a jury might find that, when the plaintiff ceased to pay premiums in May, 1919, he was totally disabled, but none from which they might find that his disability was permanent.

We respectfully submit that substantial evidence is lacking in this case to establish either of the two conditions which are essential to the recovery of disability benefits under a war-risk-insurance

contract, namely (1) an impairment of mind or body which renders it impossible for the insured to follow continuously any substantially gainful occupation and (2) a reasonable certainty that the total disability will continue throughout the lifetime of the insured (See Treasury Decision No. 20, *supra*).

The insurance protection in this case expired on May 31, 1919 (R. 248). The petitioner contended that he was permanently and totally disabled on or before April 29, 1919, which appears to have been the date of his discharge from the service (R. 3). Claim for disability benefits under the insurance protection was not made until some years later and the suit in the instant case was filed November 30, 1931 (R. 1).

It has been held by several Circuit Courts of Appeals that such deferred assertion of rights alleged to have accrued many years previously requires a high degree of supporting evidence. *Wise* v. *United States*, 63 F. (2d) 307 (C.C.A. 5th); *United States* v. *Kerr*, 61 F. (2d) 800 (C.C.A. 9th). It may be presumed that recognition was given by these decisions to the fact that the long postponement of a claim to relief benefits for such a condition as permanent and total disability is, in the absence of explanation, not consonant with normal human conduct.

Analysis of the evidence in this case discloses many facts inconsistent with the present claim of a disability alleged to have been permanently and

totally disabling in May 1919. Petitioner's testimony indicates that he communicated neither to the medical authorities in the Army nor to his immediate superiors any indication of the nervous disability which he now asserts existed during service (R. 22.) He performed the duties assigned to him in service without any disability becoming apparent to his officers or comrades (R. 87); was mustered out of service after physical examination with such alleged disability unclaimed and undetected, specifically denying disability at discharge (R. 270–273). He executed two separate sworn claims for compensation as a disabled veteran, dated more than two years after the alleged maturity of his insurance contract, assigning in each claim disabling conditions not now urged, and in one application, executed March 21, 1922, described the disability claimed as relating to "lungs and throat," indicated its inception as a year previous to the filing of the claim and estimated the disability to be of partial degree (R. 291–301; 296). Following his discharge from service petitioner worked for one company for approximately two years, and after he had married was employed by another company from 1922 until 1929, except for a brief period of employment at other work (R. 26–33).

Reviewing the evidence in the light most favorable to the petitioner we submit that at the most it tends to indicate only that the petitioner on or before May 31, 1919, was suffering from a possibly progressive nervous disorder which at that time

and for a number of years later handicapped him in employment by reason of loss of time and inability to perform work requiring strenuous physical effort or close application and which had the probable effect of reducing somewhat the remuneration received.

Even if such were the facts they would be insufficient to mature the insurance against total permanent disability. The insurance issued, which this Court has recognized in the case of *White* v. *United States*, 270 U.S. 175, was at a considerable cost to the Government over the premiums received, did not contemplate indemnity against impaired health or earning capacity, but provided insurance only against the two contingencies, death and permanent total disability, as authorized by Congress in the Act of October 6, 1917, *supra*. See *United States* v. *Pullig*, 63 F. (2d) 379 (C.C.A. 8th).

The condition of total permanent disability has long had an accepted meaning in the field of insurance, and the definitive regulation incorporated in Treasury Decision 20, *supra*, finds support in such general insurance acceptation. It has been many times recognized by various Circuit Courts of Appeals that impaired earning capacity or experienced difficulty, inconvenience, or discomfort in employment is not enough to establish an inability to follow "*any* substantially gainful occupation." (Italics ours.)

In the case of *United States* v. *Martin*, 54 F. (2d) 554 (C.C.A. 5th), certiorari denied, 286 U.S. 546, which involved a suit on a war risk insurance contract, the Circuit Court of Appeals, in reversing the judgment of the District Court stated in reviewing the evidence in the case (p. 556):

> From these facts, which are furnished by himself and his witnesses, it appears that the sum and substance of his case is that he received a wound while acting as messenger on the battle front. It has caused him suffering and disability and has to some extent handicapped him in business; it has not at all prevented him from following occupations by which he has carried his livelihood. That the government should liberally recognize wounds so received no one can doubt, and that plaintiff should receive compensation goes without saying. These matters, however, are for consideration by Congress and the agencies employed by it to administer its bounty. * * *

See also *United States* v. *Hainer*, 61 F. (2d) 581 (C.C.A. 9th); *United States* v. *Kerr*, *supra*; *United States* v. *Fly*, 58 F. (2d) 217 (C.C.A. 8th); *United States* v. *McLaughlin*, *supra*; *United States* v. *Thomas*, 53 F. (2d) 192 (C.C.A. 4th); *United States* v. *Wilson*, 50 F. (2d) 1063 (C.C.A. 4th); and *United States* v. *McPhee*, 31 F. (2d) 243 (C.C.A. 9th).

In the instant case it affirmatively appears from the petitioner's own testimony that he worked for

a period of some ten years after discharge from the Army and there is no evidence, direct or inferential, that his returns therefrom were not substantially gainful. To the contrary, testimony was given by the paymaster of the Central Vermont Railroad, for which company petitioner worked in 1922, indicating wages of substantial amount considering petitioner's qualifications and station in life as an unskilled laborer (R. 234).

Numerous decisions of Circuit Courts of Appeals have established the legal insufficiency of proof of permanent and total disability where evidence was adduced of gainful employment over extended periods. The Circuit Court of Appeals for the Tenth Circuit in the case of *Nicolay* v. *United States*, 51 F. (2d) 170, in discussing the question of employment pursued over an extended period, as in this case, said (p. 173):

> * * * the subsequent employment may be of such duration, and be of such a nature, that it conclusively refutes any idea that the insured might have been permanently and totally disabled prior to and during the employment.

In the case of *United States* v. *Rice*, 47 F. (2d) 749 (C.C.A. 9th), the court stated in the course of the opinion that (p. 750):

> * * * a finding by the jury that the appellee was unable to do that which he had been doing almost daily for a period of more than five years is without support in the tes-

> timony. In so deciding we are not invading the province of the jury; we are simply declaring the law.

In the case of *United States* v. *Perkins*, 64 F. (2d) 243, the Circuit Court of Appeals for the Tenth Circuit had under consideration a record of employment of the insured with a railway company for nine years, which bears substantial similarity to the employment record of the petitioner in this case. The court said (p. 244):

> * * * No man who is totally and permanently disabled can hold a responsible position with a railway company for nine years, averaging better than full time each month, with but one interruption of consequence. The fact of this steady, continuous, profitable employment is an unanswerable refutation to any claim that he was totally disabled during the years of that employment. A finding that a man cannot do what he in fact did, cannot stand. To so hold is to strike out the language of the contract, and to render a judgment contrary to the physical facts. This court, and other courts, have consistently held that there can be no recovery where the employment was of much shorter duration, and of much less continuity, than the employment here involved. * * *

Compare also *United States* v. *Martin, supra; United States* v. *Alvord*, 66 F. (2d) 455 (C.C.A. 1st); *United States* v. *McGrory*, 63 F. (2d) 697 (C.C.A. 1st), certiorari denied, 289 U.S. 742;

Mason v. *United States*, 63 F. (2d) 791 (C.C.A. 2d); *United States* v. *Diehl*, *supra*; *Long* v. *United States*, 59 F. (2d) 602 (C.C.A. 4th); *United States* v. *Harrison*, 49 F. (2d) 227 (C.C.A. 4th); *Nalbantian* v. *United States*, 54 F. (2d) 63 (C.C.A. 7th), certiorari denied, 285 U.S. 536; *United States* v. *Linkhart*, 64 F. (2d) 747 (C.C.A. 7th); *United States* v. *Fly*, *supra*; *United States* v. *McCreary*, 61 F. (2d) 804 (C.C.A. 9th); *United States* v. *Cochran*, 63 F. (2d) 61 (C.C.A. 10th); *Hirt* v. *United States*, 56 F. (2d) 80 (C.C.A. 10th); *United States* v. *Peet*, 59 F. (2d) 728 (C.C.A. 10th).

There have been decisions rendered in which it was held that recovery on the theory of permanent and total disability could be sustained even though the insured had worked at periods subsequent to the asserted inception date of the disability. Compare *United States* v. *Thomas*, 64 F. (2d) 245 (C.C.A. 10th); *Carter* v. *United States*, 49 F. (2d) 221 (C.C.A. 4th); *United States* v. *Phillips*, 44 F. (2d) 689 (C.C.A. 8th). But when, as in this case, an insured is shown to have obtained and held employment with two companies for an aggregate period of nearly ten years and with no evidence that he worked at substantial injury to health, a claim of total permanent disability prior thereto appears untenable. Conceding *arguendo* that petitioner was frequently absent from work during the nearly ten years in which he was employed subsequent to the date of alleged total disability, and further conceding that such interruptions of em-

ployment were all due to disability, it is nevertheless submitted that the requirement of the regulation defining total disability is not met by such evidence of interrupted activity. Concerning this point the Circuit Court of Appeals for the Eighth Circuit said in the case of *United States* v. *Perry*, 55 F. (2d) 819, 821, 824:

> * * * The word "continuously" in the definition surely does not mean every day or some definite fixed period as a year or a month, but rather means a substantial portion of time, and, if a party can pursue a gainful occupation for some substantial portion of time as compared with the labor and intensity of work of others in similar lines, he is not totally disabled. There is really no such thing as continuous labor. Holidays, sicknesses, recreation periods, week ends, all are breaks in the continuity of one's occupation, but would not necessarily destroy its continuity.
>
> * * * * *
>
> The evidence here of subsequent employment for a period of twelve years, with an intermission of eighteen months, conclusively, in our judgment, refutes any theory that insured was totally and permanently disabled prior to March 2, 1919.

The Circuit Court of Appeals for the Seventh Circuit also had occasion to pass upon this question in the case of *United States* v. *Linkhart*, *supra*, and therein said (64 F. (2d) 747, 748):

If the word "continuously" be construed to imply without any interruption at all, literal adherence to the regulation might warrant recovery as for a total and permanent disability even though the interruption of occupation or of ability to follow it was but brief and infrequent. Such interpretation of the regulation could not have been intended; or, if intended, it would not be a regulation, but rather legislation by a department without power to legislate; and it would be in contravention of the statute under which this contractual liability attaches only if the disability is *total* and *permanent*.

The regulation so construed would have the practical effect in many cases of eliminating from the contract the word "total" or "permanent," or even both, thereby plunging the insurer into a tremendous potential liability wholly uncontemplated by the contract, or by the statute which is its source.

None of the physicians called by petitioner as witnesses testified to the existence, during the life of the insurance contract, of a total disability then reasonably certain to continue totally disabling.

Of the physicians called as petitioner's witnesses, Dr. Hunt was the first to treat petitioner subsequent to the time at which it was alleged permanent and total disability had arisen. He testified that he treated the petitioner in June 1920 for "rheumatism, chronic bronchitis and nervousness" (R.

124). No complaint was made to the doctor by the petitioner of any epileptic seizures (R. 125), and in an affidavit executed by the doctor under date of December 7, 1920 (R. 124), he described the disability and specifically denoted it as only partially disabling, later testifying under cross-examination that petitioner was not totally incapacitated in 1920 (R. 126).

Dr. Herman presented the first medical evidence of the existence of any epileptic seizures in stating that he first treated petitioner for epilepsy "around 1926 or '7" (R. 168). He had previously seen the petitioner "sometime early after the war" and expressed the opinion that petitioner did not have "much trouble at that time" (R. 167). Dr. Herman's testimony affirmatively establishes that petitioner was not totally disabled from following a substantially gainful occupation even after the epileptic seizures had manifested themselves (R. 170).

The remaining medical witness for the plaintiff was Dr. Skeels, who did not see petitioner until a few months before the trial (R. 174). His testimony is primarily concerned with the possibility of epileptiform convulsions developing from traumatic injury to the head, which convulsions he said, might initially occur five years after the original injury. While he considered that the petitioner was suffering from a grand mal epilepsy at the time of his examination (R. 184), he specifically indicated that he was unable to give any testimony

concerning the petitioner's condition before the seizures manifested themselves, i.e., in 1923 (R. 186).

It may be observed that no evidence was adduced by any of the medical witnesses from which it could be said that it was a reasonable certainty prior to May 1, 1919, that the petitioner was totally disabled for life, especially, when according to the testimony of the petitioner's medical witnesses, his disability at that time was shrouded in uncertainty and was not detected by any attending physican until as late as 1920 (R. 124).

Dr. Skeels' expressed opinion that the subsequently developed form of epilepsy was attributable to service injury might be conceded and yet fail to constitute substantial evidence of a total permenant disability existing in 1919. See *United States* v. *McLaughlin*, *supra*, and *United States* v. *McPhee*, *supra*.

Dr. Skeels was the only witness who indicated the possibility of epilepsy arising from a traumatic injury after a period of five years or more and his opinion in this respect seems to be at variance with recognized authorities on epilepsy. See Fraser's "Trauma, Disease, Compensation," 1930 ed., p. 56.

It is respectfully submitted that the whole sum of the evidence adduced for the petitioner is irreconcilable with a claim of permanent total disability in May 1919, and does not meet the test of substantial evidence as established in the cases

previously cited and by this Court in the case of *Manning* v. *Cooley*, 281 U.S. 90, 94.

The case of *Birdsell* v. *United States*, 4 F.Supp. 140, appears to be almost identical with the instant case. In that case the United States District Court for Colorado directed a verdict for the Government in a claim involving epilepsy where the alleged origin, manifestation of original symptoms, inception of seizures, and work record were substantially the same as in the instant case.

The petitioner also contends that the reference in the opinion of the Circuit Court of Appeals below to the absence of expert testimony as to the temporary or permanent nature of any disability in this case, existent on or before May 31, 1919, constitutes a ruling that only such evidence will be acceptable to establish the requisite condition of permanent disability in this class of litigation. We do not believe the Circuit Court of Appeals decision in this case, or in the case of *United States* v. *Clapp*, 63 F. (2d) 793, which opinion was filed contemporaneously with, and included by reference in, the opinion in this case, can fairly be said to have any such general application. We submit, however, that under particular fact situations the reasoning of the Circuit Court of Appeals in the two cases may be correctly premised. While recognizing that there is no rule of law which requires the jury to surrender their judgment implicitly to

experts and to give a controlling influence to opinions of a scientific witness, it is nevertheless submitted that where a case concerns a highly specialized branch of medical art with respect to which a layman could have no knowledge, the court must be dependent upon expert testimony; and in such cases, in the absence of such evidence, it is improper to submit the case to the jury. This rule was recognized in the case of *Ewing* v. *Goode*, 78 Fed. 442, in which the opinion was written by Circuit Judge Taft. That case involved a suit for malpractice and in reaching the conclusion that there was no evidence before the court legally sufficient to support a verdict in the plaintiff's favor, Judge Taft said (p. 444):

> In many cases, expert evidence, though all tending one way, is not conclusive upon the court and jury, but the latter, as men of affairs, may draw their own inferences from the facts, and accept or reject the statements of experts; but such cases are where the subject of discussion is on the border line between the domain of general and expert knowledge, as, for instance, where the value of land is involved, or where the value of professional services is in dispute. There the mode of reaching conclusions from the facts when stated is not so different from the inferences of common knowledge that expert testimony can be anything more than

> a mere guide. But when a case concerns the highly specialized art of treating an eye for cataract, or for the mysterious and dread disease of glaucoma, with respect to which a layman can have no knowledge at all, the court and jury must be dependent on expert evidence. There can be no other guide, and, where want of skill or attention is not thus shown by expert evidence applied to the facts, there is no evidence of it proper to be submitted to the jury.

In a number of cases involving questions of disability, such as the future possibility of pain and suffering, the test as to whether or not the testimony of expert witnesses can alone afford substantial evidence to support a verdict seems to depend upon whether or not the disability is subjective or objective. If the disability is of the latter character the question has been held not to require the testimony of expert witnesses. See *Shawnee-Tecumseh Traction Co.* v. *Griggs*, 59 Okla. 566; *Chicago, B. & Q. R.R. Co.* v. *Warner*, 108 Ill. 538; *Lake Shore & M. S. Ry. Co.* v. *Johnsen*, 135 Ill. 641.

But where the condition or disability is subjective in character and of such a nature that laymen cannot with reasonable certainty testify as to diagnosis or prognosis, it has been held that evidence by expert witnesses must be offered. See *Strohm* v. *Railroad Co.*, 96 N.Y. 305; *Ross* v. *Kansas City*,

48 Mo. App. 440. In the *Shawnee-Tecumseh Traction Company* case, *supra,* the court said (p. 571):

> In order to lay a predicate for the submission of an instruction to the jury relative to future pain and suffering, where the injuries are subjective, the plaintiff should present proof by expert witnesses as to whether or not the injuries are incurable, and if curable the probable time it will take to effect a cure, and expert witnesses should also testify as to the extent and degree of suffering to be expected in the future, and the evidence should be of that positive nature that the jury can, with reasonable certainty, arrive at some definite conclusion on the subject, and it should not be left to surmise and speculation. In the case at bar, the main expert witness produced by the plaintiff, who knew the complete history of the case from personal knowledge, said that he did not know whether plaintiff's injuries were permanent or not. If this witness, skilled in the medical profession, with every opportunity of knowing all the facts relative to plaintiff's injuries, stated that he did not know whether the injuries were permanent or not, it is certainly most unreasonable to require a jury to take indefinite and uncertain testimony, and therefrom to find that there was a reasonable certainty that plaintiff would or would not suffer future pain which was the clear and logical result of the injury. It is plainly apparent that to require them to do so under the evidence

> offered in this case simply licenses them to enter the field of speculation and to return a verdict upon surmise and conjecture. The evidence was not sufficient to warrant the court submitting to the jury this phase of the case.

We submit that the question of whether total permanent disability exists under the particular facts of this case falls within the logic of the rule cited and that the testimony of skilled witnesses is essential to establish the requisite substantial evidence.

It is believed that it will be generally recognized and conceded that in the field of medicine, there are many physical impairments which up to a certain point manifest in common a multiplicity of symptoms identical in character. In these groups with simulating symptomatology, the true identity must be established to determine whether the disability is remedial and therefore temporary, or whether organic, not amenable to medicinal therapy, and therefore permanent. In many cases the true identity, however, may not be discernible even upon careful and scrutinizing observation by the clinician or surgeon, without recourse to the adjunctive diagnostic aids of the x-ray, laboratory, etc. Evidence, therefore, adduced solely as to the existence of such symptoms in the simulating groups would be of little value as to the true identity, degree, or permanency, and lay witnesses could obviously testify only as to the symptoms.

The evidence in this case indicates that until "the latter part of '22 or first of '23 the insured had suffered no seizures evidentiary of epilepsy (R. 13, 23), but was possibly subject to certain nervous manifestations, including spells of weakness, impairment of vision for brief periods, and difficulty encountered in pursuing strenuous effort. All of these factors or symptoms may be characteristic of so many disabilities, either functional or organic, that only an expert medical diagnostician could shed any light as to the possible nature and extent of the disability. The mere fact that epilepsy subsequently occurred could not, on the common symptoms enumerated, have established it as actually existing as a clinical entity, on such evidence. Hysteria, auto intoxication, alcoholicism, and uremia, to mention but a few conditions, would also give the premonitory symptoms above described. If later, a serious nervous disorder, such as epilepsy, occurs its diagnosis would not be difficult to the trained observer and even the observant lay witness, who might be able to give a graphic account of seizures, could furnish substantial evidence of its existence and possibly of its severity. But there would still remain for determination the relationship, if any, of such epilepsy to the alleged general manifestations above mentioned. No layman could give acceptable testimony on this point, nor could the element of speculation concerning the inception of a serious phase of the disorder be eliminated

except by qualified medical experts. Similarly speculation and conjecture would be necessary even if causation and inception were established, for lay evidence would be valueless as to the prognosis of permanency.

This fact was recognized by the Circuit Court of Appeals for the Sixth Circuit in the case of *United States* v. *Cole*, 45 F. (2d) 339, which involved a suit upon a war risk insurance contract, plaintiff alleging permanent and total disability because of impairment of vision. In holding that there was an absence of any substantial evidence to justify a verdict for the plaintiff the court said (p. 341):

> * * * There should have been some competent opinion evidence from skilled oculists or physicians, definite in its nature, at least tending to show that appellee's affliction had progressed to the extent of total permanent disability within the life of the insurance contract. * * *

In support of the ruling made on this point the court cited the case of *Hardy Burlingham Mining Co.* v. *Baker*, 10 F. (2d) 277.

In the latter case the plaintiff had recovered a judgment based on an alleged personal injury of nervous character which it had been contended was due to the inhalation of poisonous gases during the time the plaintiff worked in the defendant's coal mine. The Circuit Court of Appeals reversed the judgment for absence of substantial evidence, and

said with respect to the question of the testimony of medical experts (p. 280):

> * * * In the ordinary run of affairs, all men have some knowledge as to the natural effects or the probable causes of certain conditions. Such matters do not depend, save as to their extent and refinements, upon expert knowledge and opinion, and all of us may reason intelligently thereon, to a certain point. Upon other subjects this is not true, as, for example, with regard to any chemical reactions beyond those most common and familiar. It is especially not true with diseases of the nerves, or with abnormalities in physiological functions. It is common knowledge that with the latter, and even more with the former, the real cause of the trouble is frequently most obscure. Very often only the most expert diagnosticians can intelligently judge what the cause was, and frequently they can only say what it may have been. It is, we think, common knowledge—if not, this record may supply it—that a great share, perhaps most, of the cases of "nervous wreck" develop without any known specific physical cause. When, therefore, a claim that such a result followed from a known and specific physical or functional upset comes before a court as a basis for demanding compensation therefor, there must, in aid of common knowledge, be some definite and competent expert proof, which shall at least show a fair and reasonable

probability of the cause and effect relation. * * *.

The only medical testimony in this case which bore even remotely upon the question of the identity of epilepsy as a disability from which the plaintiff was suffering at the time of the lapse of his insurance was that of Dr. Skeels and he merely suggested the possibility of the existence of epilepsy in some form, probably of the petit mal type, although his testimony in this regard is confused and obscure (R. 183–187). Such would not be legally sufficient proof. See *McCrosson* v. *Philadelphia Rapid Transit Co.*, 283 Pa. 492 (1925); *White* v. *United States*, 53 F. (2d) 565, 567 (C.C.A. 5th).

Neither Dr. Skeels nor any other medical witness testified that epilepsy, if it then existed, was totally permanently disabling. To permit the jury in this case to decide a question as to the permanence of a disability in 1919 when there was no evidence either of lay or medical witnesses bearing upon it would, as the Circuit Court of Appeals pointed out, allow the indulgence of "mere guess work." In the case of *Eggen* v. *United States, supra,* it was held in a well reasoned opinion rendered by Judge Sanborn, that a finding of total permanent disability might not be based solely upon speculation and conjecture. (Cf. *United States* v. *Blackburn*, 33 F. (2d) 564 (C.C.A. 9th.)) We submit that such is the sole basis for the jury's finding in this case and even if the Circuit Court of Appeals was in error in

assigning the absence of expert evidence relating to the question of permanence of disability as a reason for the reversal of the judgment, nevertheless the decision should be affirmed. It is well settled that the fact that a trial court sustained a motion for a directed verdict on a wrong theory is wholly immaterial if the motion could have been sustained on another ground. *Joslyn* v. *Cadillac Automobile Co.*, 177 Fed. 863 (C.C.A. 6th); *Latting* v. *Owasso Mfg. Co.* 148 Fed. 369 (C.C.A. 8th); *Cork* v. *Lehigh Valley R. Co.*, 98 N.J. L. 143; *Proctor* v *Dillon*, 235 Mass. 538; *Noble* v. *Canon City*, 73 Colo. 374.

It is also well settled that error cannot be predicated on an opinion or reason given by the court for a ruling or decision, but must be inherent in the ruling or decision itself. *Evans* v. *Sucss Ornamental Glass Co.*, 83 Fed. 706, certiorari denied, 171 U.S. 687.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment of the court below should be affirmed.

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